82-899

No.

Office - Supreme Court, U.S.
FILED
NOV 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1982

BIAGIO PINTO a/k/a BOB PINTO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CARMEN C. NASUTI
NASUTI & MILLER
1325 Spruce Street
Philadelphia, PA 19107
(215) 545-8488
Counsel for Petitioner

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTION PRESENTED

Whether a prosecution for the offense of federal mail fraud is justified on the basis of violation of a private firm's policy forbidding employees from accepting gratuities where employees received gratuities but falsely reported to their employer that they had not done so.

PARTIES TO THE PROCEEDING

Four defendants were tried jointly in this case. In addition to petitioner, the defendants were John Buchanan, Edward Pfeffer and George Keckeisen. Following conviction and sentence, all four defendants appealed. Each defendant's appeal was separately docketed in the Court of Appeals (Nos. 82-1165, 82-1169, 82-1170, 82-1398). A single panel of that court decided all four cases on the same day.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9
By Interpreting 18 U. S. C. 1341 to Reach the Facts of This Case, the Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Ought to Be Settled by This Court	9
CONCLUSION	16
APPENDIX A—Court of Appeals Judgment Order	A1
APPENDIX B—District Court Memorandum and Order	A3
APPENDIX C—Court of Appeals Order Denying Rehearing	A27

TABLE OF AUTHORITIES

Cases:	Page
United States v. McNeive, 536 F. 2d 1245 (8th Cir. 1976) ..	12
United States v. Rabbitt, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U. S. 1116 (1979)	11, 12, 14
United States v. Von Barta, 635 F. 2d 999 (2d Cir. 1980) ...	9, 12
Williams v. United States, — U. S. —, 102 S. Ct. —, 73 L. Ed. 2d 767 (1982)	10

Statutes and Rules Cited:

18 U. S. C. 1014	10
18 U. S. C. 1341	2, 3, 9, 11, 15
28 U. S. C. 1254(1)	2
Elkins Act, 49 U. S. C. 41(1)	3
Federal Rule of Criminal Procedure 23(c)	4

No.

IN THE

Supreme Court of the United States

October Term, 1982

BIAGIO PINTO a/k/a BOB PINTO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. A., *infra,* A1-A2) is not yet reported. The memorandum and order of the district court (App. B, *infra,* A3-A26), are also not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1982 (App. A, *infra*, A1). A timely petition for rehearing in banc was denied by an order entered on October 13, 1982 (App. C, *infra*, A27). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTE INVOLVED

18 U. S. C. 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

This is a federal criminal case involving conviction of mail fraud in violation of 18 U. S. C. 1341 and a related conspiracy.[1] Affirmance of the conviction by the Court of Appeals results in extension of this federal crime to circumstances not previously included. It is this expansion of the scope of a malleable federal criminal statute that provides the basis for this petition for certiorari.

American Airlines moved freight from one airport terminal to another by means of truck transport. This type of shipment, known in the trade as "HUB trucking," was done by various trucking companies under contracts with American Airlines. Pinto Trucking Service, Inc. (hereinafter "PTS") was one of the firms that provided this service for American. Petitioner, Biagio Pinto, owned and operated PTS. He was tried and convicted for mail fraud on the basis of gratuities that he paid to three American Airlines' employees who held various jobs in American Airlines' freight division. The three employees, Buchanan, Keckeisen and Pfeffer, were also charged and convicted of mail fraud. The conviction rests upon a determination that these employees falsely reported to their employer that they had not received any gratuities.

---

1. Petitioner was also convicted of a single count of conspiracy, but the basis for this count is the same as the twelve substantive counts of mail fraud. The same flaw that vitates the mail fraud counts undermines this conviction for a related conspiracy.

The indictment charged petitioner and his codefendants with violations of the Elkins Act, 49 U. S. C. 41(1). The district court found that the facts proved did not make out a case under these charges and acquitted the defendants. (42a).

Citations to pages with the suffix "a" refer to the appendix filed in the court below for the several appeals of petitioner and his codefendants.

The case was tried in the district court without a jury. The trial judge, as required by Federal Rule of Criminal Procedure 23(c), filed findings of fact. Those findings now provide the principal basis for the decisions by the trial court in the first instance, and by the Court of Appeals on appeal.[2]

The district court received and explicitly relied upon a stipulation of agreed facts submitted jointly by the prosecution and defense to the trial court. This stipulation, made of course with the consent of the government, is also pertinent to the decisions of the courts below.

The key finding of the district court was that the payment of gratuities by petitioner to the three American Airlines' employees did not result in any economic injury to American Airlines. In Finding of Fact No. 29, the district court noted that American Airlines, after learning of the nature and extent of the gratuities paid, still had no complaint about the quality of the services provided by PTS or of the prices that PTS charged for those services.

> From at least 1966 until sometime in 1981, American Airlines was satisfied with the quality of service pro-

---

2. In addition, in the Court of Appeals, the Brief for the United States ignored the district court's findings of fact. The government presented its argument by elaborate citation to those parts of the evidentiary record which it believed would support a general verdict of guilty. The Court of Appeals did not hear oral argument and announced its decision in a brief judgment order that contains no analysis by that court. Thus, it cannot be known whether the Court of Appeals was led to err by the failure of the government to limit its argument to the district court's findings. It is highly inappropriate, after a nonjury trial, to ignore the considered conclusions of the district judge, who may or may not have accepted as true evidence that the prosecution adduced in its effort to win conviction. In this petition, as in the appeal by petitioner in the court below, the factual basis for the case is represented by the district court's findings.

> vided and the tariff rates filed by PTS. In fact, American Airlines continued to utilize the carriage service of PTS for approximately three years subsequent to the termination from employment of the defendants Keckeisen, Pfeffer and Buchanan (35a).

This critcial finding of fact was buttressed by the stipulation that a formal senior management official of American Airlines had declared, with full knowledge of the activities of these employees and their receipt of gratuities, that he could not understand what these employees might have done for PTS in return for the gratuities (101a).

In the courts below, the government sought to establish that the three employees had defrauded American Airlines by wrongfully awarding contracts to PTS. Its efforts to make such a case were based upon gross exaggeration of the power that these three employees had to control the selection or retention of carriers to serve American Airlines. The findings of fact establish clearly that these employees lacked such power. Such decisions were made in the corporate headquarters of American Airlines, by senior officers of the corporation. None of petitioner's codefendants ever held such senior posts. A former senior officer of American Airlines, fully knowledgeable of the manner in which contract decisions were made, thus declared that he could not understand what these employees could have done for PTS in return for the gratuities. Further, American Airlines continued to use the services of PTS for three years after the employment of the three employees had been terminated.

The government built its case around the theory that the Manager of Freight Sales and Services at various airports had authority to control trucking contracts. Defendants Buchanan, Keckeisen and Pfeffer each served for a time in this post at the Philadelphia airport. Pfeffer and

Keckeisen held similar posts at other airports for part of the time after leaving Philadelphia. In Finding of Fact No. 9, the district court found that the contracting relationship between PTS and American Airlines "significantly correspond(ed) to the promotions and transfers of the American Airlines' defendants" (25a).

This finding of fact is clearly erroneous. The only trucking contract won by PTS when one of the defendants was manager of an airport freight facility was service between Chicago and Indianapolis (30a). Pfeffer, then manager of the American Airlines' freight service in Chicago, recommended PTS to his corporate superiors, but the same recommendation was also made by the manager at Indianapolis, with whom PTS had had no prior contact (809a-810a). The decision to award the Chicago to Indianapolis contract to PTS was not made by either airport manager, however; that decision was made by a senior vice president in the corporate headquarters in New York.

Conclusive proof that the freight managers at airports lacked power to control contract awards is shown in the findings that PTS failed to win contracts even though one of the defendants, as freight manager of an airport facility, had recommended PTS. PTS failed to win a contract for the New York-Syracuse run even though Keckeisen, freight manager in New York, recommended PTS (34a-35a). PTS failed to obtain a contract for service between Boston, New York and Philadelphia even though freight managers at two of these airports recommended PTS (31a-32a).

The facts as found by the district court, therefore, do not show any significant correspondence between the awarding of American Airlines' business to PTS and the service of petitioner's codefendants in their roles as freight

managers of airport facilities for American Airlines.[3] Only one contract was ever awarded in these circumstances. Moreover, the record clearly shows that the payment of gratuities to the three employees did not coincide with their assignment to the airport freight managerial positions.

The court found, for example, that defendant Buchanan had received gratuities from petitioner for twelve years, from 1966 to 1978 (26a-27a). Prior to 1976, when he became freight manager of the Philadelphia facility, Buchanan had held subordinate positions in American Airlines' freight section at the Philadelphia airport. The government made no effort to prove and the district court made no finding that an employee in the subordinate positions held by Buchanan for ten of those twelve years could even make a recommendation or otherwise influence the selection or retention of a trucking company. The record does not support any conclusion that petitioner paid gratuities to three American Airlines' employees in connection with their service as freight managers in airport facilities.

Notwithstanding the demonstrated lack of power of petitioner's three codefendants to control the award of trucking contracts by American Airlines, and despite the almost total failure of their recommendations to influence

---

3. The conclusion that the employees did not award or influence the award of contracts to PTS is underscored by the determination in the trial court that there was no violation of the Elkins Act, 49 U. S. C. 41(1). In *United States v. Braverman*, 373 U. S. 405 (1963), this Court held that a violation of the Elkins Act is shown if a carrier makes payments to an employee of a shipper in order to obtain shipping business. The acquittal of defendants in this case of any violation of the Elkins Act negates any finding that the gratuities paid here were related to the awarding of trucking contracts to PTS.

the contracting decisions of the officers of American Airlines, the district court found that petitioner's payment of gratuities to these three employees afforded PTS a "preferred and exceptional status with respect to eventual award of American Airlines' 'HUB' trucking routes and the provision of certain services" (24a-25a).[4]

In sum, this mail fraud conviction rests upon findings that three American Airlines employees, who had received gratuities from petitioner, recommended on occasion that their employer contract with PTS, and that these employees concealed their receipt of gratuities by filing false statements with their employer.

The district court (Hannum, D.J.) sentenced petitioner to imprisonment for five years on the conspiracy count and to two years of prison for each of the twelve substantive mail fraud counts. The two year sentences were ordered to be served concurrently, but consecutive to the five year term. The trial judge also sentenced petitioner to a fine of $10,000.

The Court of Appeals for the Third Circuit (Gibbons, Weis and Sloviter, C.JJ.) affirmed.

---

4. In another finding of fact, No. 18, the district court elaborated by stating that "American Airlines was deprived of the opportunity to search for or gain access to a carrier providing a higher quality of service at a lower price" (29a) (footnotes omitted).

REASONS FOR GRANTING THE PETITION

By Interpreting 18 U. S. C. 1341 to Reach the Facts of This Case, the Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, But Ought to Be Settled by This Court.

The statutory definition of the crime of mail fraud is extraordinarily malleable and, therefore, a special responsibility lodges in the federal courts to control application of the statute to matters of legitimate federal concern. The convictions of petitioner and his codefendants are an unprecedented and unwarranted expansion of the scope of this federal offense. Never before has the crime of mail fraud been invoked when the underlying "fraud" is violation by an employee in a private firm of his employer's conflict of interest policy on receipt of gratuities.

The pertinent language of the mail fraud statute, 18 U. S. C. 1341, defines the offense in these terms: "scheme or artifice to defraud, or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises." As the Court of Appeals said in a recent case, the provisions of this act are "seemingly limitless." *United States v. Von Barta*, 635 F. 2d 999, 1001 (2d Cir. 1980). It is an imperative judicial function to construe such statutes to prevent the unnecessary involvement of federal courts into matters that can be left to the states for resolution.

Containment of seemingly limitly federal criminal statutes is an especially vital concern when the federal courts are massively overburdened with a caseload that, in the views of some justices and judges, threatens the capacity of those courts to function. Any extension of a major federal criminal statute into new fields is an important question that ought to be considered by this Court.

Only last Term, this Court acted to constrain expansion of federal criminal provision dealing with fraudulent conduct, but a far less pervasive provision than the mail fraud statute. The statute involved makes it a crime to make a false statement in connection with an advance from a federally insured financial institution. 18 U. S. C. 1014. Federal prosecutors sought to apply this act to check kiting schemes. This Court held that the government's interpretation of the statute would make a surprisingly broad range of unremarkable conduct a violation of federal law. The conviction was set aside. *Williams v. United States*, — U. S. —, 102 S. Ct. —, 73 L. Ed. 2d 767 (1982).

The government's theory in the present case would make a surprisingly broad range of unremarkable conduct a violation of the federal mail fraud statute. It is the government's theory that three employees of American Airlines devised a scheme or artifice to defraud their employer when they accepted gratuities from petitioner and falsely reported to American Airlines that they had not done so. There were no sustainable findings in the trial court that these employees intended to injure their employer in any way. The actions of American Airlines after learning of the employees' actions demonstrate that it suffered no injury, and the trial court explicitly found that American Airlines was fully satisfied with the quality and price of petitioner's firm's services. False statements about gratuities on conflict of interest reports, with no showing of intent to injure or actual injury to the employer, should not be comprehended within the federal mail fraud statute.

In the courts below, the government conceded that there is no precedent for the application of the federal statute to circumstances like those presented in this case.

Indeed, examination of the caselaw reveals that, until now, lower federal courts have consistently resisted use of the mail fraud in employer-employee disputes of this kind. This Court has not yet accepted the opportunity to review any of the decisions involving application of the mail fraud statute to employer-employee transactions. There now exists a clear pattern of cases which provide adequate background to guide this Court in establishing appropriate principles to interpret section 1341.

In the case that most closely resembles the present case, the Eighth Circuit held that there was no federal crime. *United States v. Rabbitt*, 583 F. 2d 1014 (8th Cir. 1978), *cert. denied*, 439 U. S. 1116 (1979). The defendant had been a member of the Missouri House of Representatives and eventually became the Speaker of the House. While a member of the House, Rabbitt offered to use his influence to help a firm of architects to get contracts for architectural services on public buildings; in exchange, Rabbitt required a fee of 10 percent from any resulting contracts. Rabbitt carried out his part of the scheme, and the firm received contracts. Payments of Rabbitt's fee were concealed by paying them through a law firm. There was no evidence of financial loss to the state. The government contended that Rabbitt's conduct was fraudulent because it deprived the citizens of Missouri of their right to his honest and faithful service. The Eighth Circuit rejected this contention:

> Whether a showing of dishonesty on the part of a state official, outside his official duties, with no financial loss to the state constitutes a fraud upon the public and thereby statutory mail fraud is, in our judgment, highly questionable. Every case of breach of public trust and misfeasance in office in connection with which some mailing has occurred

> does not and cannot fall within the confines of the mail fraud statute. In the instant case, we hold that the evidence does not establish mail fraud within the federal statute. . . .

The Eighth Circuit decision in *Rabbitt* is in accord with its earlier decision in *United States v. McNeive*, 536 F. 2d 1245 (8th Cir. 1976).

The Second Circuit has also rejected the broad argument that would bring employer-employee disputes within the scope of federal mail fraud:

> In the instant case, we are asked to construe two seemingly limitless provisions, the mail and wire fraud statutes, in the context of the employer-employee relationship. The government urges us to hold that these statutes are violated whenever an employee, acting to further a scheme for pecuniary gain, intentionally breaches a fiduciary duty of honesty and loyalty he owes his employer. . . . (W)e reject the sweeping theory advanced by the government. . . . *United States v. Von Barta, supra*, 1001-1002 (footnotes omitted).

In the present case, as in *Von Barta*, there were violations of the corporate policy of the employer. The three American Airlines employees denied receiving gratuities in violation of a company rule. That did not prevent them from carrying out their official duties to their employer. American Airlines has made no complaint of any actions that these employees took in the performance of their responsibilities. As in *Rabbitt*, these employees did not have the authority to enter into contracts. Petitioner was selected by a senior vice president of American Air-

lines, and the court below found that American was fully satisfied with the price and quality of the trucking services provided by petitioner's firm. That view did not change even after American Airlines become aware of the gratuities their employees had accepted from petitioner.

The government's attempt to make out a violation of the federal mail fraud statute in this case has consisted of a series of vague generalizations extracted from the reported decisions and presented, devoid of any factual content, as support for its sweeping conclusions. When the cases are examined in factual context, however, it is plain that there is no support for the government's argument. All mail fraud cases in which convictions of employees have been upheld fall into four categories:

(1) Employees' stealing and exploiting assets that belong to their employers;

(2) Employees' deceiving their employers into entering into contracts with entities secretly owned by those employees;

(3) Purchasing agents' abusing their authority to contract for their principals by demanding kickbacks from firms wishing to do business with those principals;

(4) Elected high level public officials' violations of public trust.

The prosecution in the present case does not fit into any of these four categories. There is no charge here that the employees stole an asset belonging to their employer. The employees did not induce American Airlines to let contracts to a firm that they secretly owned. These employees were not purchasing agents. Although

the government has sought and continues to seek to exaggerate their roles in the system of recommendations that filtered up to corporate headquarters on contract matters, even the government does not argue that they had the power of purchasing agents. And, of course, these employees may have violated a corporate policy on gratuities, but they certainly were not involved in high level political corruption.

The category of cases into which this case fits is that described by the Second and Eighth Circuits as falling outside the reach of federal criminal prosecution. This is driven home by the lame attempt of the government to distinguish *United States v. Rabbitt, supra.* Thus, the government argues that Rabbitt's employer was not the state or the citizens of the state, as the Eighth Circuit had found, but was only the state legislature. From this muddled premise, the government argues that the state agencies contracting for architectural services had been victimized, not Rabbitt's employer, the House of Representatives. Legislators are elected by the citizens and are officers of the state. The government's spurious distinction of *Rabbitt* underscores the unprecedented nature of this conviction.[5]

Neither the American Airlines employees nor petitioner in this case should be convicted of federal mail fraud on the basis of gratuities that the employees re-

5. This argument appears in the United States Brief, filed in the court below as appellee in the appeals of the three American Airlines employees, at pp. 42-43. The government also states that the Eighth Circuit upheld one mail fraud conviction in the *Rabbitt* case, but the government does not point out that the only question raised as to that conviction was whether the use of the mails had been sufficiently connected to the fraudulent scheme to permit conviction of mail fraud. The facts involved were entirely different from the facts in the 10 counts that were reversed.

ceived from petitioner and concealed from their employer. There is not even a civil suit by American Airlines against the employees. No officer or executive of American Airlines found anything to criticize in their work. For violating the company conflict of interest rules, they forfeited their jobs. That is an inadequate basis for bringing the weight of federal criminal law to bear. Petitioner's circumstances are more compelling for reversal. American Airlines has made no complaint about the trucking services provided by petitioner's firm. It continued using that service for three years after discovery that the employees had accepted gratuities from petitioner. This clearly indicates that American Airlines treated its own conflict of interest rules as an internal matter, having nothing to do with petitioner or his firm.

In light of the pattern of decisions that has evolved in the lower federal courts, it is timely and appropriate for this Court to provide definitive guidance on the scope of section 1341 in circumstances involving employment relations. Unless this Court intervenes promptly, the expansionist interpretation by the courts below in this case will lead government prosecutors and other courts to increase the number of mail fraud prosecutions arising from employee violations of terms and conditions of their employment. The scope of the expansion would be extraordinary. False expense account vouchers or false statements of hours worked would become grist for federal criminal prosecution whenever some nexus with a mailing is found. Petitioner will contend that such expansion of the mail fraud statute's effective range is improper. The immediate question, for purposes of this petition for certiorari, is not just the merits of the matter but whether it is timely for this Court to consider the issue and render a definitive decision.

CONCLUSION

The pressures on this Court have been growing rapidly. Every expansion of the scope of a federal statute inevitably impacts on the workload of this Court. With all of the demands on this Court's time, a high priority should be given to the shaping and limiting of the scope of federal criminal statutes. That is particularly true with a statute as "seemingly limitless" as the mail fraud statute. This petition for certiorari should be granted.

Respectfully submitted,

CARMEN C. NASUTI
Counsel for Petitioner

November, 1982

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1398

UNITED STATES OF AMERICA

v.

BIAGIO PINTO, a/k/a BOB PINTO

(D.C. Criminal No. 81-0057-01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
September 14, 1982

Before: GIBBONS, WEIS and SLOVITER, *Circuit Judges*

JUDGMENT ORDER

Biagio Pinto appeals from a judgment of sentence following his conviction in a bench trial for mail fraud, 18 U.S.C. § 1341, and conspiracy, 18 U.S.C. § 371. He contends that:

(1) the trial court's finding of fact are clearly erroneous and inconsistent with a stipulation of facts establishing that no fraud occurred;

(2) the mail fraud conviction is inconsistent with his acquittal on Elkins Act charges;

(3) there is insufficient evidence of his knowledge of misrepresentation by employees of American Airlines to their employer;

(4) absent proof of a corrupt quid pro quo for gratuities given to American Airlines employees, he cannot be found to have been a member of an unlawful conspiracy.

These contentions are without merit.

It is ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By THE COURT,

/s/ JOHN J. GIBBONS
Circuit Judge

Attest:

/s/ SALLY MRVOS
Sally Mrvos, *Clerk*

DATED: SEP 14 1982

Certified as a true copy and issued in lieu of a formal mandate on October 21, 1982.

Test: M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 81-00057

UNITED STATES OF AMERICA

v.

BIAGIO ROBERT PINTO, a/k/a BOB PINTO, GEORGE V. KECKEISEN, EDWARD PFEFFER and JOHN BUCHANAN

MEMORANDUM AND ORDER

HANNUM, *J.* JANUARY 14TH, 1982

On February 26, 1981, the grand jury returned a twenty-one (21) count indictment charging the defendants, collectively, with mail fraud and Elkins Act offenses as well as conspiracy. 18 U.S.C. § 1341, 49 U.S.C. § 41(1); 18 U.S.C. § 371.[1] Essentially, the defendants al-

1. 18 U.S.C. § 1341 provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail

1. (Cont'd.)

according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

49 U.S.C. § 41(1) provides:

(1) Anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said Acts or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than

legedly combined in a single conspiracy whereby the defendants Keckeisen, Pfeffer and Buchanan abused their employment positions with American Airlines for personal profit by affording preferential contract or bargaining status to a business controlled by the defendant Pinto.

1. (Cont'd.)

$1,000 nor more than $20,000: Provided, That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

(a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (1) at less than the rate in effect under chapter 107 of this title, or (2) by practicing discrimination, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

18 U.S.C. § 371 provides, in part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Pinto Trucking Service [hereinafter "PTS"] was a common carrier engaged in the business of transporting merchandise and freight by motor vehicle which received several regional contracts from American Airlines to perform trucking services. The case was tried to the Court without a jury and at its conclusion counsel were directed to submit proposed findings of fact and conclusions of law. On December 29, 1981, a narrative of undisputed facts was filed, *see* Docket Entry No. 86, pp. 1-12, which additionally contained a list identifying a number of unresolved factual issues. The Court will render findings of fact as it perceives them, relying principally upon counsels' submission of undisputed facts. The disputed factual issues will be resolved therein.

FINDINGS OF FACT [2]

1. At all times material herein, American Airlines provided air freight transportation services which were actively conducted by separate freight departments located at various airport terminals. Managers of freight sales and services conducted the business of the local operations but were administratively overseen by the Vice President for Freight Marketing.

2. Services performed by the local departments which are material to the prosecution of this case are what is known in the industry as "HUB" trucking and the processing of international freight through customs. The concept of "HUB" trucking entailed the utilization of trucking companies to transport freight from one local American Airlines' facility to another. Processing international freight through customs involved the unloading and stor-

2. The Court will provide references to the record in support of its findings with respect to disputed facts. When undisputed facts are found and recorded, there will be no reference to the record. Instead, see Docket Entry No. 86.

age of freight, the confirmation and preparation of bills of lading, airway bills, interline agreements and invoices and the clearing of freight through customs. The term "inbound—in bond" is frequently used in conjunction with this latter freight service and refers to the bonding requirements for handling freight entering the United States from abroad.

3. As earlier mentioned, "HUB" trucking services were usually performed by independent carriers which had been retained by American Airlines. Decisions concerning the procurement, retention and discharge of local "HUB" truckers were generally reached in accordance with an American Airlines' policy whereby both field and staff personnel were utilized. Essentially, the local freight sales and services managers would undertake a determination whether a "HUB" trucker was needed and, depending upon that determination, would make a recommendation of a particular carrier to satisfy the perceived need. This recommendation was to be based upon several factors including tariff rates, quality of service and availability of equipment. The local managers' recommendation would be forwarded to the Director of Freight Marketing and, ultimately, to the Vice President for Freight Marketing for approval. Although the local managers were empowered to merely recommend a particular carrier, their recommendations were usually adopted primarily because of the deference afforded their perceived familiarity and expertise with local situations. *See* Notes of Testimony, pp. 3.16, 4.51, 5.21.

4. As will be further developed, PTS was an independent carrier utilized by American Airlines to perform "HUB" trucking services. PTS was effectively owned and controlled by the defendant Pinto and was located at 1414 Calcon Hook Road, Sharon Hill, Pennsylvania.

5. The defendant George Keckeisen was employed by American Airlines in various capacities from at least, for purposes of this case, 1971 and until April of 1978. In 1971, he replaced the defendant Edward Pfeffer as Manager of Freight Sales and Services in Philadelphia and remained in that position until August of 1976. At that time, he was transferred to New York to manage freight sales and services at the JFK airport terminal.

6. The defendant Edward Pfeffer was employed by American Airlines in various capacities from at least, for purposes of this case, 1966 and until April of 1978. In 1966, he began serving as Manager of Freight Sales and Services in Philadelphia and continued that function until sometime in 1971 when he was promoted to an administrative position requiring service in New York. His title in New York was that of Director of Freight Forwarding Sales. Subsequently, in September of 1974, he was transferred to O'Hare Airport in Chicago to serve as Manager of Freight Sales and Services.

7. The defendant John Buchanan was employed by American Airlines in various capacities from at least, for purposes of this case, 1966 and until April of 1978. From at least 1966 until August of 1976, he served in Philadelphia as Supervisor of Freight Services under the management of both the defendants Pfeffer and Keckeisen. In August of 1976, he was promoted to the position of Manager of Freight Sales and Services in Philadelphia, replacing the defendant Keckeisen.

8. Until their employment was terminated, each of the defendants Keckeisen, Pfeffer and Buchanan received job promotions or promotional transfers at various times of their respective careers. Their job performances, respectively, were generally viewed favorably by American Airlines' personnel.

9. The evidence, developed of record, both directly and inferentially establishes that the defendant Pinto, in order to further the business interests of PTS, extended bribes, kickbacks and gratuities to the defendants Keckeisen, Pfeffer and Buchanan who in turn afforded the defendant Pinto a preferred and exceptional status with respect to the eventual award of American Airlines' "HUB" trucking routes and the provision of certain services. The defendants Keckeisen, Pfeffer and Buchanan's intentional receipt of bribes, kickbacks and gratuities resulted in the preferred and exceptional selection, retention and increase of PTS contractual relationships with American Airlines in a manner significantly corresponding to the promotions and transfers of the American Airlines' defendants.[3] *See* Finding of Fact No. 3.

10. During the entire period of the alleged conspiracy from 1966 until January of 1978, the defendant Keckeisen directly and indirectly, through conduits, received money payments in the form of business checks upon the instance of the defendant Pinto. Additionally, in 1974, the defendant Keckeisen accepted and received a 1973 Mercury Station Wagon from the defendant Pinto. The defendant Keckeisen accepted these gratuitous payments and merchandise and negotiated or utilized them for his personal benefit in conscious violation of an American Airlines' conflict of interest policy.[4] *See also* Government Exhibits Nos. 857-857(b), 858-858(a).

---

3. Citations to the record in support of this finding is not immediately supplied *but will be included in subsequent findings elaborating upon this point.* In addition, the Court notes that its finding that all of the defendants intentionally engaged in a reciprocal exchange of favors does not imply that a single conspiracy rather than multiple conspiracies existed. This important aspect of the case will be addressed separately. *See* Findings of Fact Nos. 31-34.

4. *See* Finding of Fact No. 15 for a brief discussion of American Airlines' conflict of interest policy.

11. During the entire period of the alleged conspiracy from 1966 until January of 1978, the defendant Pfeffer directly and indirectly, through conduits, received money payments in the form of business checks upon the instance of the defendant Pinto. The defendant Pfeffer accepted these gratuitous payments and negotiated them for his personal benefit in conscious violation of an American Airlines' conflict of interest policy.[5] *See also* Government Exhibit Nos. 856-856(g).

12. During the entire period of the alleged conspiracy from 1966 until January of 1978, the defendant Buchanan directly and indirectly, through conduits, received money payments in the form of business checks upon the instance of the defendant Pinto. The defendant Buchanan accepted these gratuitous payments and negotiated them for his personal benefit in conscious violation of an American Airlines' conflict of interest policy.[6] *See also* Government Exhibit Nos. 855-855(h).

13. Information of the defendants Keckeisen, Pfeffer and Buchanan's financial relationship with the defendant Pinto was material to the conduct of business by and best interests of American Airlines inasmuch as "HUB" trucking was a viable aspect of American Airlines' business and

5. *See* note 4 *supra.*

6. *See* note 4 *supra.* The Court notes that one of the factual issues in dispute contained in Docket Entry No. 86 concerns whether the defendant Buchanan received cash from the defendant Pinto. The inclusion of this issue as one in dispute appears to be inconsistent with the itemization in the same document of those factual issues the resolution of which is not in dispute. Perhaps this apparent inconsistency may be explained as a matter of semantics; that is, cash versus checks. Notwithstanding, the Court specifically finds that the defendant Buchanan did receive, directly or indirectly, gratuitous payments from the defendant Pinto, both in the form of business checks as well as cash. *See* Notes of Testimony, pp. 1.69-.73.

the defendants Keckeisen, Pfeffer and Buchanan's recommendation of "HUB" trucking carriers was integral to its conduct.

14. The business checks specifically identified in Counts 1-4, 6-12 and 14-21, inclusive, of the indictment were admittedly among the aforementioned business checks utilized by the defendant Pinto to accomplish money payments to the defendants Keckeisen, Pfeffer and Buchanan. Additionally, the aforementioned business checks were intentionally distributed to the defendants Keckeisen, Pfeffer and Buchanan through the use of the mail system.

15. The aforementioned American Airlines' conflict of interest policy essentially prohibited its employees or members of their immediate families from receiving money or gifts from suppliers of goods or services. There is no direct evidence that the defendant Pinto knew of this policy.

16. PTS exclusively operated the Philadelphia "HUB" trucking routes at least as early as 1966, *see* Notes of Testimony, pp. 3.145-.146; 4.66, 4.78, and continued this function until sometime in 1981. *See* Notes of Testimony, p. 5.78.

17. During the tenure of PTS's exclusive operation of "HUB" trucking in Philadelphia, each of the defendants Keckeisen, Pfeffer and Buchanan served as Manager of Freight Sales and Services. As earlier found, *see* Findings of Fact Nos. 5-7, the defendant Pfeffer served in this capacity from 1966 until sometime in 1971, the defendant Keckeisen from sometime in 1971 until August of 1976 and the defendant Buchanan from August of 1976 until his termination in April of 1978. In addition, the defendant Buchanan served as Supervisor of Freight Services under

the direction of both defendants Pfeffer and Keckeisen from 1966 until August of 1976. *See* Finding of Fact No. 7.

18. As a consequence of the defendants Pfeffer, Keckeisen and Buchanan's collective [7] extension of a preferred and exceptional status to the defendant Pinto and PTS over the period from 1966 until April of 1978, American Airlines was deprived of the opportunity to search for or gain access to a carrier providing a higher quality of service or a lower price.[8] While PTS was the sole "HUB" trucker physically located in Philadelphia which was equipped to service American Airlines' local operation, *see* Notes of Testimony, pp. 3.128, 8.64, there existed carriers located outside Philadelphia which were equipped to service American Airlines although there is some uncertainty with respect to their route authority. *See* Notes of Testimony, pp. 3.139-.140, 8.71. In this latter regard, there is no requirement that a carrier be located in an area of service as evidenced by the ability of PTS to perform services for American Airlines in Chicago and Dallas. *See* Notes of Testimony, pp. 4.34 and 3.140.

19. On December 3, 1974, PTS was awarded the Chicago-Indianapolis "HUB" trucking route servicing American Airlines. *See* Government Exhibit No. 808(b). *See also* Notes of Testimony, p. 3.81.

20. At the time PTS was initially awarded the lucrative Chicago-Indianapolis "HUB" trucking route, the de-

7. The Court's use of the word "collective" does not imply a finding of a conspiracy but rather merely refers to the different tenures of the American Airlines' defendants while serving as Manager of Freight Sales and Services in Philadelphia. *But see* Finding of Fact Nos. 31-34.

8. This is not intended to suggest that the service offered by PTS was inferior or its prices excessive. *See* Finding of Fact No. 29.

fendant Pfeffer was Manager of Freight Sales and Services at O'Hare Airport and had functioned in that capacity only since September of 1974. The defendant Pfeffer had in fact recommended PTS over the existing carrier, Commercial Motor Freight Company [hereinafter "Commercial"], on November 18, 1974 based upon his stated perception that PTS could provide a better service at a lesser rate. *See* Government Exhibit No. 808(a); Notes of Testimony, p. 3.17. The defendant Pfeffer stated in his November 18, 1974 memo to the Indianapolis general manager that PTS would charge a flat rate per pallet rather than the exclusive-use, trip charge made by Commercial which would result in savings to American Airlines in excess of $3,000.00 per month. Additionally, the defendant Pfeffer noted the superiority of equipment provided by PTS. Although not mentioned in the defendant Pfeffer's memo, PTS had also agreed to paint the American Airlines logo on its trucks, unlike Commercial. *See* Notes of Testimony, p. 4.21.

21. Based upon the statements made in the defendant Pfeffer's aforementioned recommendation, it appears as though PTS made a more attractive offer to American Airlines to service the Chicago-Indianapolis "HUB" trucking route than that extended by Commercial. PTS, however, failed to comply with the terms of its offer once awarded the route. *See* Notes of Testimony, pp. 6.20-.21. PTS almost immediately began charging American Airlines an exclusive truck rate while continuing to carry freight for other customers as well as charging American Airlines for round-trip carriage when only one-way services were provided. *See* Government Exhibit Nos. 811(c), (e), (g), (i), 833(b); Notes of Testimony, pp. 3.92, 4.37-.38. As a consequence, PTS's actual charges for similar services were 12% higher than those charged earlier by Commercial. *See* Notes of Testimony, p. 6.20-.21. In this regard, Commer-

cial was adequately, if not equally, equipped and qualified as PTS to continue the operation of servicing the Chicago-Indianapolis "HUB" trucking route. *See* Notes of Testimony, pp. 4.18-.19. PTS provided an additional charge to American Airlines for painting the latter's logo on its trucks. *See* Notes of Testimony, pp. 4.27-.28.

22. In 1976, the defendant Keckeisen recommended to American Airlines' administrative offices that PTS be given a proposed "HUB" trucking route between Boston, New York and Philadelphia. No decision with respect to this and other recommendations forthcame from the administrative offices inasmuch as the purpose underlying the need for a single "HUB" trucking route was eliminated. *See* Notes of Testimony, p. 5.16.

23. In May of 1976, the American Airlines' freight department in Philadelphia began processing international freight through customs for PTS.

24. At the time American Airlines commenced supplying this service to PTS, the defendant Keckeisen served as Manager of Freight Sales and Services and the defendant Buchanan acted as his Supervisor of Freight Services. As earlier found, in August of 1976, the defendant Buchanan was promoted to the manager position, replacing the defendant Keckeisen who had been transferred to New York. *See* Notes of Testimony, p. 4.100.

25. The utilization by PTS of American Airlines' Philadelphia freight department for the processing of international freight was primarily related to its carriage of "inbound—in bond" materials. In this regard, the processing of PTS's "inbound—in bond" freight involved additional effort and services than that usually extended or provided other customers of American Airlines. *See* Notes of Testimony, pp. 3.149, 3.167-.170. In addition, it ap-

pears that PTS received these services at a rate substantially less than that charged other customers of American Airlines. The normal rate varied between 1½ cents to 2 cents per pound with a minimum charge of $300.00 per month while PTS was merely charged 1 cent per pound during May of 1976 and ¼ cent per pound thereafter. *Compare* Notes of Testimony, p. 4.94 *with* Government Exhibit Nos. 790(a)-(r).

26. The defendants Pinto, Keckeisen and Buchanan contend that the provision of a lower rate to PTS is attributable to the prior inefficient use of American Airlines' employees and thereby resulted in the more effective use of what is known in the industry as "down time" and that if the lower rate had not been afforded PTS it would not have utilized the service. The record developed in this case, however, reflects that American Airlines eventually was required to employ more persons to perform the services utilized by PTS and others. *See* Notes of Testimony, pp. 4.127, 4.134-.135. Additionally, it would appear more prudent to utilize "down time" employees in a manner more effectively increasing revenue than at the comparatively nominal rate charged PTS. Finally, the failure of the defendants Keckeisen and Buchanan to procure the required contract approval of the administrative offices of American Airlines and the unusual procedures involved in the mailing of invoices casts dispersions on the entire arrangement. *See* Notes of Testimony, pp. 4.109, 4.156-.157 and 4.107, 4.158.

27. The defendant Keckeisen administered—prior to its mailing—the processing of the invoice dated July 15, 1976 by providing the necessary factual information for its preparation. *See* Notes of Testimony, p. 5.106; Government Exhibit No. 790(b). The defendant Buchanan administered—prior to its mailing—the processing of the in-

voice dated August 23, 1976 by providing the necessary factual information for its preparation. *See* Notes of Testimony, pp. 4.103, 5.106; Government Exhibit No. 790(c).[9]

28. In the Fall of 1977, American Airlines was in the process of deciding which carrier to select for the operation of its New York-Syracuse "HUB" trucking route. During the course of the decision-making process a controversy arose between the respective managers of New York and Syracuse concerning which of two carriers was appropriate to service their route. The New York manager, the defendant Keckeisen, recommended PTS while the Syracuse manager recommended Herlihy Trucking Company [hereinafter "Herlihy"]. *See* Notes of Testimony, pp. 5.23-.24. The defendant Keckeisen based his recommendation on his opinion that Herlihy provided unreliable service in a couple of instances and that PTS charged a lower rate. *See* Government Exhibit No. 761. Upon the completion of an American Airlines' investigation, it was discovered that the defendant Keckeisen was in error both with respect to his complaints about the reliability of Herlihy's service and the cost differential he said favored PTS. *See* Notes of Testimony, pp. 5.28, 5.33 and 5.33. As respects cost of service, it was learned that PTS on at least one occasion charged American Airlines the round-trip rate when only one-way service was provided. *See* Notes of Testimony, pp. 5.29, 5.37. The defendant Keckeisen never acknowledged his error despite advice to the contrary but rather continued his recommendation of PTS. *See* Notes of Testimony, pp. 5.35, 5.37. Ultimately, Herlihy was selected to service the route. *See* Notes of Testimony, p. 5.23.

29. From at least 1966 until sometime in 1981, American Airlines was satisfied with the quality of service pro-

9. *See* Counts 5 and 13 of the Indictment, respectively.

vided and the tariff rates filed by PTS. In fact, American Airlines continued to utilize the carriage service of PTS for approximately three years subsequent to the termination from employment of the defendants Keckeisen, Pfeffer and Buchanan.

30. During the defendant Pfeffer's tenure as Director of Freight Forwarding Sales, he was empowered to recommend the creation of "HUB" trucking routes as well as carriers but had no authority to ultimately approve or disapprove. *Compare* Notes of Testimony p. 4.52 *with* pp. 4.64-.65. The defendant Pfeffer's power to recommend extended only so far as his familiarity with local operations and apparently was not unlike the power afforded local managers of freight sales and services. *See* Notes of Testimony, p. 4.52.

31. The provision of monetary payments and gifts by the defendant Pinto to each of the defendants Keckeisen, Pfeffer and Buchanan and the reciprocal provision of business-related favors by each to the defendant Pinto irrefutably establishes the existence of an agreement between the defendant Pinto and each of the defendants Keckeisen, Pfeffer and Buchanan. *See* Notes of Testimony, pp. 3.68-.69, 3.75-.75.

32. On several occasions, the defendants Keckeisen and Buchanan met at the defendant Pinto's business office. *See* Notes of Testimony, pp. 1.64-.67, 1.76. Moreover, the defendants Keckeisen and Buchanan jointly contributed to the provision of international freight services to the defendant Pinto. *See* Notes of Testimony, p. 4.112.

33. In November of 1972, two anonymous letters were received at the American Airlines' office located in Philadelphia. One of the letters was addressed to the defendant Keckeisen and alleged that the defendant Bu-

chanan's wife was receiving payments from PTS. The defendant Keckeisen conducted an initial but inconsequential inquiry and failed to further investigate. *See* Government Exhibit No. 790(b).

34. The defendant Pfeffer was acquainted with the defendants Keckeisen and Buchanan through various and timely work relationships and transitions and from limited social contacts. *See* Notes of Testimony, pp. 3.86-.88, 4.47, 4.88-.90. *But compare* Notes of Testimony, pp. 4.47-.48 *with e.g.* Notes of Testimony, p. 4.112. The defendant Pfeffer did not participate in the provision of international freight services to PTS. *See* Notes of Testimony, p. 4.132.

Conclusions of Law

Mail Fraud

1. The elements essential to establish a violation of the mail fraud statute, 18 U.S.C. § 1341, are a scheme or artifice to defraud and the use of the United States mails in execution of the scheme. *See, e.g., Pereira v. United States,* 347 U.S. 1 (1954); *United States v. Kaplan,* 554 F.2d 958 (9th Cir. 1977).

2. In order to establish a particular defendant's culpability for a mail fraud offense, the government has the burden of demonstrating beyond a "reasonable doubt that the defendant not only knowingly performed acts which the law forbids, but that he did the acts with the intent to violate the law." *United States v. Bryza,* 522 F.2d 414, 421 (7th Cir. 1975). As a consequence, there must be a recognizable scheme formed with the specific intent to defraud. *See, e.g., United States v. Bohonus,* 628 F.2d 1167, 1172 (9th Cir. 1980). "The critical element is fraudulent intent." *United States v. Regent Office Supply Co.,* 421 F.2d 1174, 1180 (2nd Cir. 1970).

3. The Government may satisfy the requirement that it demonstrate a specific intent to defraud attributable to a particular defendant by offering evidence of instances when the particular defendant took actions preventing the discovery of his misdeeds or, for purposes of the instant case, his breach of a fiduciary duty. *See United States v. Bryza, supra* at 422. The acts of forming artificial companies, creating or identifying conduits for receiving payments and failing to disclose economic interests constitute actions capable of manifesting specific intent. *See, e.g., United States v. Bush,* 522 F.2d 641, 649 (7th Cir. 1975); *United States v. Bryza, supra* at 422.

4. The object of a fraudulent scheme need not be the deprivation of a tangible interest but instead may relate to an intangible property. *See, e.g., United States v. Barta,* 635 F.2d 999, 1006 (2d Cir. 1980); *United States v. Bohonus, supra* at 1172; *United States v. Kelly,* 507 F. Supp. 495, 501 (E.D. Pa. 1981).

5. A scheme which is directed at depriving an employer of the honest and faithful services of its employees or of its "right to have its business conducted honestly may constitute a 'scheme to defraud' within the meaning of the mail fraud statute." *United States v. Kelly, supra* at 499. *See also United States v. Bohonus, supra* at 1172. However, the breach of an employee's fiduciary duty, without more, does not constitute such a violation. *See, e.g., United States v. Mandel,* 591 F.2d 1347, 1362 (4th Cir. 1979); *United States v. McDonald,* 576 F.2d 1350, 1359 n.14 (9th Cir. 1978). "The additional element which frequently transforms a mere fiduciary breach into a criminal offense is a violation of the employee's duty to disclose material information to his employer." *United States v. Barta, supra* at 1006. *See also United States v. Kelly, supra.*

6. The additional element of failure to disclose material information to an employer may be established by evidence of misrepresentations in company conflict of interest statement, withholding of information concerning interest in private enterprises which are being recommended to engage in contractual services, withholding of information concerning business advantages being afforded particular private enterprises and misrepresentations in recommendations utilized for the purpose of selecting private enterprises to perform contractual services. *See, e.g., United States v. Bush*, 522 F.2d 641, 647 (7th Cir. 1975); *United States v. Bryza, supra; United States v. Kelly, supra.* Accordingly, the material information withheld or misrepresented must be related to the conduct of the employer's business. *See, e.g., United States v. Rabbitt*, 583 F.2d 1014, 1024-25 (8th Cir. 1978).

7. Of course, if the object of a fraudulent scheme relates to the deprivation of a tangible property, a mail fraud offense may be found. Tangible property may be deprived when a service is provided a particular enterprise at a cost substantially less than that charged other various customers, when a private enterprise which is contracted to perform services does so at a cost higher than that actually charged by a competitor or when, as a result of recommendations, an employer is deprived of an opportunity to obtain better terms in a contract. *See United States v. Bush, supra* at 647-48.

8. In order to constitute a mail fraud offense there is no requirement that the victims of the crime ultimately suffer economic loss or damage. *See, e.g., United States v. Bush, supra* at 648; *United States v. Reicin*, 497 F.2d 563 (7th Cir. 1974). Nor is there a need for a victim to take retributive actions. *See United States v. Bryza, supra* at 422.

9. "The mailing element [necessary to establish a mail fraud offense] . . . consists of two requirements: (1) that the defendant caused the use of the mails and (2) that this use was 'for the purpose of executing' the deceptive scheme." *United States v. Pereira, supra* at 8-9.

10. The defendants Pinto, Keckeisen, Pfeffer and Buchanan engaged in a scheme to defraud American Airlines and used the mails in the furtherance of that scheme. Moreover, the aforenamed defendants had a specific intent to engage in the fraud, all in violation of 18 U.S.C. § 1341.

Elkins Act

11. 49 U.S.C. § 41(1) provides, in pertinent part, that "it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate . . . commerce by any common carrier . . . whereby any such *property shall . . . be transported at a less rate than that named in the tariffs published and filed by such carrier,* . . . or whereby any other advantage is given or discrimination is practiced." (Emphasis added).[10]

12. The intended purpose of this statute is "to prevent any kind of departure from the published rates and to that end [Congress] outlawed all rebates, without requiring a showing of benefit to any shipper." *United States v. Braverman,* 373 U.S. 405, 406 (1963). *See Baltimore and Ohio Chicago Terminal Railroad Company v. United States,* 583 F.2d 678, 690-91 (3d Cir. 1978).

10. *See* note 1 supra for the full text of 49 U.S.C. § 41(1). It may be noted that this statute was recodified, effective October 17, 1978, without substantive effect. 49 U.S.C. § 11903(a).

13. The government has failed to develop of record evidence beyond a reasonable doubt that there was a deviation from the tariff rates published and filed by PTS.

Conspiracy

14. Count I of the indictment charges that the defendants Pinto, Keckeisen, Pfeffer and Buchanan "did willfully and knowingly *conspire, confederate, combine and agree amongst themselves* and with others . . . to commit offenses against the United States in violation of Title 18, United States Code § 371 . . . ." (Emphasis added). The charge is that of a single, continuing conspiracy.

15. The primary element essential to establish the existence of a conspiracy is agreement.[11] "It is a partnership in criminal purpose. The gist of the crime is the confederation or combination of minds." *Marino v. United States*, 91 F.2d 691, 694 (9th Cir. 1937). "The formalities of an agreement [, however,] are not necessary . . . ." *United States v. Varelli*, 407 F.2d 735, 741 (7th Cir. 1969).

16. The existence of a conspiracy may be established by resort to or reliance upon circumstantial evidence. *See, e.g., United States v. Trotter*, 529 F.2d 806, 810 n.4 (3d Cir. 1976). A common purpose and plan may be inferred from a "development and collocation of circumstances." *Glasser v. United States*, 315 U.S. 60, 80 (1942).

17. In the present case, the common purpose of the conspiracy, particularly as charged in the indictment, was

11. Of course, the agreement must have an illegal purpose. *See United States v. Cahalane*, 560 F.2d 601, 604 (3d Cir. 1977); *United States v. Klein*, 515 F.2d 751 (3d Cir. 1975). In the present case, the illegal purpose has been earlier established and identified. *See* Conclusions of Law Nos. 1-10.

for PTS to procure and maintain American Airlines' freight business. The common purpose was not limited to the procurement and/or retention of particular American Airlines' "HUB" trucking routes or freight services. The defendants Pinto, Keckeisen, Pfeffer and Buchanan were members of the conspiracy and participated in the achievement of its objective. *See, e.g., Blumental v. United States,* 332 U.S. 539 (1947); *United States v. Boyd,* 595 F.2d 120 (3d Cir. 1978) (conviction reversed on other grounds).

18. In order to establish the participation of a particular defendant in a conspiracy, the government "must demonstrate that the defendant agreed with others to join the conspiracy and participate in the achievement of the illegal objective." *United States v. Grassi,* 616 F.2d 1295, 1301 (5th Cir. 1980). More than mere knowledge of a conspiracy and an association with its participants is required, *see, e.g., United States v. Falcone,* 311 U.S. 205 (1940), although evidence of this nature combined with other circumstantial evidence may prove joinder. *United States v. Etley,* 574 F.2d 850 (5th Cir. 1978).

19. Evidence of knowledge of a conspiracy in addition to actions taken in furtherance of it may imply a particular defendant's participation. *United States v. Provenzano,* 620 F.2d 985, 999 (3d Cir. 1980). Acts of receiving monetary payments in return for preferential treatment in contract relationships coupled with the continuation and expansion of such relationships despite geographical and promotional transfers constitute this type of evidence. These acts reflect and represent the receipt of profits or proceeds as well as the suggestion that the plan or purpose is not limited to the particular transactions. *See United States v. schoenhut,* 576 F.2d

1010, 1028 (3d Cir. 1978) and *Blumenthal v. United States, supra* at 558.

20. Evidence of meetings with co-conspirators and the resort to subterfuge for the receipt of monetary payments may also circumstantially establish or imply a particular defendant's participation in a conspiracy. *See, e.g., United States v. Calabro*, 449 F.2d 885, 889-90 (2d Cir. 1971) and *United States v. Cahalane, supra* at 605. "Such acts, though some might be innocent in themselves, when viewed as a whole tie the defendant inextricably to the conspiracy." *United States v. Schoenhut, supra* at 1027.

21. "[O]ne can be a party to a conspiracy even though he does not know of the existence or identity of all his co-conspirators, and even though he does not participate in *all* of their acts." *United States v. Friedman*, 445 F.2d 1076, 1080 (9th Cir. 1971). (Emphasis added). Nor must a particular defendant know all of the details of a conspiracy, just the essentials. *See United States v. Alvarez*, 625 F.2d 1196, 1198 (5th Cir. 1980).

22. "[T]he government, without committing a variance between a single conspiracy charged in an indictment and its proof at trial, may establish the existence of a continuing core conspiracy which attracts different members at different times and which involves different sub-groups committing acts in furtherance of the overall plan." *United States v. Boyd, supra* at 123. *See also United States v. Kenny*, 462 F.2d 1205, 1216 (3d Cir. 1972).

VERDICTS

The Court notes that its Conclusions of Law with respect to Count 1, charging conspiracy, are equally ap-

plicable to Counts 2-13, inclusive, charging mail fraud, insofar as they pertain to identifying the collective guilt of the defendants. "[A] multidefendant mail fraud scheme can be analyzed like a conspiracy." *United States v. Camiel*, 519 F. Supp. 1238, 1241 n.7 (1981), *citing, e.g. United States v. Cohen*, 516 F.2d 1358, 1364 (8th Cir. 1975). The Court finds the defendants Pinto, Keckeisen, Pfeffer and Buchanan guilty of each of Counts 1 through 13, inclusive, but finds them not guilty of Counts 14 through 21, inclusive.

An appropriate Order will be entered.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL No. 81-00057

UNITED STATES OF AMERICA

v.

BIAGIO ROBERT PINTO, a/k/a BOB PINTO, GEORGE V. KECKEISEN, EDWARD PFEFFER and JOHN BUCHANAN

ORDER

AND Now, this 14th day of January, 1982, the Court finds the defendants Pinto, Keckeisen, Pfeffer and Buchanan guilty as to each of Counts 1 through 13, inclusive, but not guilty as to each of Counts 14 through 21, inclusive.

/s/ JOHN B. HANNUM
John B. Hannum, *J.*

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1398

UNITED STATES OF AMERICA

v.

BIAGIO PINTO, a/k/a BOB PINTO

(D.C. Criminal No. 81-0057-01)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JOHN J. GIBBONS
Judge

Dated: October 13, 1982